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Substantive Appellate Review in Capital Cases

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I would like to focus my remarks on one of the two recommendations we are discussing today. I will not talk at length about recommendation number ten, which proposes the creation of a Death Penalty Review Commission, although I do believe that this is an important part of the overall plan to eliminate mistakes in the administration of the death penalty. Many prominent experts in the area of innocence and the death penalty, including the two co-founders of The Innocence Project, Barry Scheck and Peter Neufeld, have strongly advocated such an idea. Connecticut and North Carolina have recently created Innocence Commissions and more states are sure to follow. So I certainly hope that recommendation number ten will be seen generally as a good and not highly controversial idea.

What I would like to talk about briefly is recommendation number nine, which proposes that the Massachusetts Supreme Judicial Court (and the trial court as well, but I'll be talking mostly about the appellate court) should possess and should exercise broad, substantive review power over death sentences, so that the Court should reverse any death sentences on the merits and without regard to procedural defaults or barriers if it substantively disagrees with the jury's imposition of death.

This recommendation originated in some of the work that I did in Illinois in 2002 and 2003. At that time the Illinois Senate Judiciary Committee was studying the Illinois Governor's Commission Report and the eighty-five proposed reforms therein. One of those proposed reforms was that the Illinois Supreme Court should be required to engage in comparative proportionality review of every death case. For those who are unfamiliar with the term, comparative proportionality review means that the appellate court must compare the capital case before it with a universe of factually similar death-eligible cases. If the result reached in the instant case is disproportionate, based on the comparison with the results reached in the universe of similar cases, then the court must set aside the death sentence.

In August 2002, I testified before a panel of the Illinois Senate Judiciary Committee and expressed my view that comparative proportionality review was a fundamentally flawed concept. As I put it to the panel members: In the end what is the goal? What is the ultimate goal of comparative proportionality review? What do you hope to achieve at the end of the day? It seems to me that the goal must be to produce a legal taxonomy of death. In other words, to identify, through the inductive process of these explicit comparisons between cases, those possible combinations of factors that should lead to

a death sentence as well as those that should lead to a non-death sentence, i.e., to a life sentence.

But, as we heard yesterday, Justice Harlan wrote back in 1971 that this is a task beyond present human ability. And I believe that even today we cannot produce a formula that will tell us when the death penalty should be imposed and when it should not. We cannot do this today anymore than people could do it at the time that Justice Harlan wrote those words. Thus, I argued to the Senate Judiciary Committee Panel, it would be better to focus the appellate courts—to truly focus their attention—on the substantive merits of each individual death sentence, rather than engage in a process of explicit case comparisons that could lead only to a jurisprudential dead end.

I, therefore, ended up proposing an alternative idea: That the Illinois Supreme Court be required in every death penalty case to review the fundamental justice of the death sentence, on the merits and without regard to any procedural defaults or barriers, and also without regard to whether that unjust sentence resulted from any procedural error at the trial. This came to be known as the Fundamental Justice Amendment, or FJA, and after some political twists and turns, in November 2003 the FJA was overwhelmingly approved as a key part of the bipartisan death penalty reform bill in Illinois. It became the law in Illinois in January 2004.

Although it is far too early to be able to observe any effects in practice, the FJA provides the Illinois Supreme Court with a new and powerful way to ensure substantive accuracy and fairness in capital cases. And it has been so described by numerous observers—including the Chicago Tribune, which originally opposed the FJA—as one of the most important and potentially beneficial features of the 2003 reform legislation.

Now, in Massachusetts it was not necessary to propose something like the FJA, because the Massachusetts Supreme Judicial Court already possessed similar authority under existing state law. All that was necessary was for the Governor's Council to highlight that existing authority, and to encourage strongly the Massachusetts Supreme Judicial Court to feel free to exercise it. And that is what we did in recommendation number ten.

In my opinion, the idea of substantive appellate review is an idea whose time has come. In most other countries around the world substantive appellate review is viewed as an essential component of a fair criminal justice system. Our focus in modern America on procedural justice has all too often left us unwilling or unable to recognize the simple reality that even perfect trial procedures do not guarantee perfect outcomes. Sometimes juries do make mistakes, even in a procedurally fair trial. We should empower our appellate courts, not just in capital cases (although the momentum starts there), to protect defendants from such substantive mistakes. This does not interfere with the basic purpose of the defendant's right to a jury trial. It merely supplements it with an additional safeguard for the defendant's liberty.

Are there potential problems with substantive appellate review? Yes. Two come immediately to mind. First, appellate judges may not choose to exercise this power, especially if they fear the political consequences of reversing a death sentence. Second, juries eventually may become aware of this power, and this knowledge may diminish the jury's proper sense of moral responsibility for the capital sentencing decision that it must make at trial. These problems need to be addressed as the FJA and similar proposals gradually take effect. Nevertheless, in the end I believe that substantive appellate review will someday be seen as one of the significant advances in twenty-first century American criminal jurisprudence. Yes, it will require a role reorientation by appellate judges who have become accustomed to examining criminal cases through a

procedural lens only. But this shift in roles, I believe, can only work to the overall betterment of the criminal justice system. Thank you and I look forward to your comments.

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